SUPREME COURT, U.S.

FILED

In the Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. [illegible]/06

ETEL OBER and IDAN HAGIVAN,

Petitioners,

vs.

JAMES C. HAGY and JOSEPH HAGY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

[illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. _____.

ETEL OBER and IOAN NAGYIVAN,

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vs.

JAMES C. NAGY and JOSEPH NAGY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

The Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered in the above entitled case on January 11, 1967.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the Probate Court of Cuyahoga County, Ohio, is unreported and is printed in Appendix I hereto. The judgment of the Court of Appeals for the Eighth District of Ohio is unreported and is printed herein in Appendix II. The judgment of the Supreme Court of Ohio is unreported and is printed in Appendix III hereto.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on January 11, 1967. Rehearing was denied on February 8, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257(3).

THE MANNER IN WHICH THE FEDERAL QUESTIONS ARE RAISED.

The petitioners sought review in the Supreme Court of Ohio of the judgment of the Court of Appeals of Ohio affirming, without opinion, the judgment of the Probate Court, whereby the rights of these petitioners were extinguished in violation of due process of law.

The right to a review by the Supreme Court of Ohio is dependent upon the discretion of the court in determining that the case is one of public or great general interest, or that a substantial constitutional question is invoked. Rules of Practice of the Ohio Supreme Court, Rule I, Sec. 1A(a) (b) (c), Rule II, Sec. 3, printed in Appendix IV hereto.

The petitioners sought review of the decision of the Court of Appeals by means of a motion in the Supreme Court of Ohio requesting it to direct the lower appellate court to certify its record to the Supreme Court of Ohio for review, and as an appeal of right on the ground that the decision of the Court of Appeals of Ohio denied the petitioners the constitutional right to due process as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, and that said decision violates the Consular Treaty of 1881 between the United States and Romania, and infringes upon the conduct of foreign relations with said country.

The Supreme Court of Ohio denied the motion to certify and rejected the appeal as of right on the basis that no substantial constitutional question is involved.

The petitioners applied to the Supreme Court of Ohio for a rehearing, urging that the judgment of the court is contrary to the due process provision of the Fourteenth Amendment to the Constitution of the United States, and

that it conflicts with superior federal policy as set forth in the Consular Convention of 1881 between the United States and Romania, and further interferes with and obstructs the conduct of foreign relations between the respective countries. The application was denied on February 8, 1967, Appendix III.

QUESTIONS PRESENTED.

1. Upon appeal to the Probate Judge from the decision of a Referee, in a case which was heard by the latter in accordance with Rule 30 of the rules of the Probate Court of Cuyahoga County, Ohio, may the judge ignore and/or reject the evidence as set forth in a bill of exceptions which was duly settled by the Referee as the trier of the facts, and enter a judgment in conflict with such evidence?

2. May a court refuse to consider official documents from Romania, relevant to the issues involved, which have been duly authenticated and legalized by the respective consular officers of the United States and Romania?

LEGAL RULE INVOLVED.

The legal rule involved is Rule 30 of the Rules of the Probate Court of Cuyahoga County, Ohio, Appendix V.

STATEMENT.

Theresa Kovacs died intestate on or about May 4, 1963, a resident of Cleveland, Ohio. James C. Nagy, the respondent, was appointed as administrator of her estate. James C. Nagy, as administrator, filed a petition in the Probate Court for a determination of the heirs of said decedent. The petitioners, Ioan Nagyivan and Etel Ober,

residents and nationals of Romania, filed an answer to the said petition alleging that they are the brother and niece, respectively, of the decedent, Theresa Kovacs, and, as such, that they are entitled to inherit from said estate as provided by law. The only other claimants to the estate are James C. Nagy, also known as Imre Nagyivan, and his brother, Joseph Nagy, also known as Iosif Nagyivan, nephews, respondents herein, who are residents of Cleveland, Ohio.

The petition for determination of heirs was referred by the Probate Judge to a referee for hearing, and was heard by a full time referee of the Probate Court in accordance with Rule 30 of the Rules of the Probate Court of Cuyahoga County. There were two hearings on said petition before the referee reached his decision. The first hearing was held on April 20, 1964, and the other on October 14, 1964. For this reason, we shall refer to the testimony which was presented at the April hearing as AR and that of the October hearing as OR. The record also contains the deposition of Anna Pascau. We shall refer to its herein as RDP.

The referee rendered his decision on February 11, 1965 (Appendix VI) whereby he found that these petitioners, Ioan Nagyivan and Etel Ober, are brother and niece, respectively, of the decedent, and, therefore, entitled to share in the estate. The Motion for Rehearing was overruled by the referee. Upon an appeal to the Probate Judge, which was heard solely on briefs and oral arguments of counsel, and upon the bill of exceptions and record before the referee, the judge overruled the referee, and concluded that there was no evidence to support a finding that petitioners were the brother and niece, respectively, of the decedent, and, therefore, entitled to inherit from her estate.

The Court of Appeals affirmed the decision of the Probate Judge without any opinion, and without indicating any reason or reasons in support thereof, although specifically confronted with the constitutional questions involved.

REASONS FOR GRANTING THE WRIT.

1. The Decision Complained of Violates the Requirement of Fundamental Fairness Assured by the Due Process Clause and the Denial of Property Provision of the Fourteenth Amendment to the Constitution of the United States.

The Probate Judge held that "The transcript of testimony taken before the referee shows no proof of the nature required by statute which would establish heirship of persons in Romania." (Appendix I.)

A recent statement of the Supreme Court of Ohio on this subject is to be found in *Bradford v. Mickelthwaite*, 163 Ohio St. 301, at page 303:

> "The determination of Heirship Act, comprising Sections 10509-95 to 10509-101, inclusive, General Code (Sections 2123.01 to 2137.07, inclusive, Revised Code), represents new legislation which became effective January 1, 1932. Such act provides for a special proceeding ancillary to the administration of an estate and gives permissive authority to an executor or administrator to call upon the Probate Court for a determination of what persons are entitled to a decedent's property."

At the outset, it must be emphasized that the only issue which was presented for determination in this proceeding was whether the petitioners, Ioan Nagyivan and Etel Ober, brother and niece, respectively, of our de-

cedent, survived the decedent, Theresa Kovacs. There is no dispute about the fact that the decedent had a brother named Ioan Nagyivan and a niece named Etel Ober, both of whom lived in Romania. The referee found "there is also no question that the decedent had a niece and brother living in Romania at one time." (Appendix VI, page 22.)

Petitioners' (defendants') Exhibit 2D, which is the english translation of a power of attorney executed in the Romanian language by Etel Ober and Ioan Nagyivan at the Office of the State Notary for the Region of Banat, Romania, contains an "Official Report of Authentication, No. 7791 of August 22, 1963," and reads in its pertinent portion, as follows:

> "Before me, Nicolae Angelescu, Chief Deputy Notary, appeared Ioan Nagyivan residing at Boulevard Mihai Viteazu, Nr. 16, in the city of Timisoara, and Etel Ober, born Nagyivan, residing at Nr. 23 Ion Vasi Street in the city of Timisoara, both of whom have been first identified through their Identity Bulletins (Identity Cards) who signed the within Power of Attorney and consented to the authentication of all copies thereof.
>
> At the same time, there appeared before me, Wilhelm Frigyes, who resides at Nr. 40 Mihai Miteazul Blvd. in the City of Timisoara and Paulina Szanto Stefania, who resides at Nr. 19 Ion Vasi Street in the city of Timisoara, as attesting witnesses to the execution and authentication of these presents, the aforesaid parties having been identified through their identity bulletins."

This document, defendants' Exhibit 2D, as well as defendants' Exhibits 2A thru 2N, *were admitted without objection.* All of these documents have been duly authenticated by the appropriate authorities, including the American Consul in Bucharest.

Upon a reading of the afore-quoted portion of defendants' Exhibit 2D, it is readily apparent that two individuals who were first identified by their Identity Cards as being Ioan Nagyivan and Etel Ober, of Timisoara, appeared before a Chief Deputy Notary, and before two witnesses, and signed a certain power of attorney, defendants' Exhibit 2D. The State Notary, according to Romanian law, is an official arm and a constituent part of the Ministry of Justice. All State Notaries are lawyers and many of them are retired judges, all of whom are appointed by the Ministry of Justice. Probate matters and administration of decedent's estates are handled by this office (OR 14, 15).

The Official Report of Authentication, which appears in defendants' Exhibit 2D, is taken from the official records of the Office of the State Notary for the Region of Banat, at Timisoara, Romania, and certifies the official action taken there regarding this matter. It shows that the identity of the petitioners was first established by the official in said office through the use of the identity card and the two attesting witnesses who were present at the execution and authentication of the power of attorney. The Identity Bulletin or card is issued to all residents of Romania, and must be carried at all times on their person. This card contains a photograph and information about the vital statistics of its bearer. It is exhibited to the appropriate officials in connection with all governmental matters (RDP, 10, 11), (OR 14). This evidence, which is documentary in form and immutable, supports the finding of the referee that the appellants are alive.

There is additional evidence on the question of whether Etel Nagyivan Ober and Ioan Nagyivan, of Timisoara, Romania, are the niece and brother of our decedent, Theresa Kovacs, and whether they survived

her. We find among the authenticated documents, defendants' Exhibits 2F and 2G. This is a "Declaration of Heirship," or in other words, a statement about the heirs of Theresa Kovacs, made before a State Notary under the sanctions of the penal code, by two disinterested parties who knew the decedent, Theresa Kovacs, and her family. Defendants' Exhibit 2G is the official translation into english of said document which had been executed in romanian, being defendants' Exhibit 2F. During cross-examination, counsel for the respondents herein, asked that said "Declaration of Heirship" be read into the record in its entirety, AR, 24, 25, 26.

The record reveals other reliable and probative evidence. We have reference to Exhibit C, which contains two photographs, taken in July 1964 between the hearings before the referee, and an official identification and acknowledgment by the State Notary whereby he certifies that the people in the photographs are Etel Ober and Ioan Nagyivan. This procedure of official identification of a person by a State Notary is provided for by Romanian law. *Respondents offered these pictures, as their own evidence, OR 12.* The record discloses that according to romanian law (OR 13, 14, RDP 10, 11) every citizen has issued to him and must carry with him at all times, a so-called Identity Bulletin, which contains his or her photograph and other vital statistics. This Identity Bulletin must be presented upon request to all governmental authorities.

Then, of added interest, we have (respondents') Exhibits A and B. Exhibit A is a list of questions prepared and submitted by James Nagy, one of the respondents, to be asked of Etel Ober by the undersigned counsel, on the occasion of the latter's trip to Romania in the summer of

1964. Exhibit B contains the answers given by Etel Ober to said questions. Significantly, the respondents offered the questions and answers, aforesaid, into evidence as *their exhibits.*

Obviously, these questions were prepared by the respondents to test the identity of Etel Ober as the sister of these respondents. It is noteworthy, we believe, that from 50 questions requiring answers involving very intimate relationships, and about matters which happened approximately 50 years ago, the respondents had challenged the answers of Etel Ober to only 13 or 14 questions. And most of these amounted only to a difference of recollection between the parties. Can there be any sincere and genuine question about Etel Ober being alive when you consider her unchallenged answers to questions of a most intimate nature? Could someone other than the sister of these respondents obtain information about the very unusual cause of the grandfather's death? Or to question 22—that their mother was in the hospital for a hernia? Or to all the other questions which went unchallenged?

In the face of the evidence supporting the claim of these petitioners, the respondents insisted that their sister and uncle, Etel Ober and Ioan Nagyivan, are dead and did not survive the decedent. To establish this claim, the respondents testified that sometime in 1947 the Red Cross notified their parents that Etel Ober was dead. There is no other evidence, whatsoever, to corroborate the contention that Etel Ober died in 1943, and no evidence, whatsoever, that the uncle, Ioan Nagyivan, did not survive the decedent.

The instant action was tried by a full time referee of the Probate Court in accordance with Rule 30 of the Rules of the Probate Court of Cuyahoga County, Ohio. The deci-

sion of the referee was adverse to the respondents, Joseph and James Nagy, and was appealed by them to the Probate Judge for review. The appellate procedure of Rule 30 is substantially the same as that of an appeal on a question of law to the Court of Appeals. A bill of exceptions must be prepared by the appealing party which must comply with the statutory procedure for settling a bill, it must be certified by the referee and filed with the Probate Judge. Subsections (d) (e) (f). Subsection (d) of Rule 30 reads, in part, as follows: "* * *. The bill of exceptions must be in the same form and content as though it were being presented to a trial judge and must contain a statement that all parties in the case have been notified of its filing." (Appendix V.) The appeal to the Probate Judge must be by written assignment of errors, and brief, with opposing party filing a brief also. Subsection (k) provides that the judge shall make his decision on the bill of exceptions, assignment of errors, briefs and oral arguments. If either party wishes to present "newly discovered evidence" "the judge will re-refer the matter to the referee for a hearing." (k) (4.)

It, therefore, is clear that the evidence upon which the Probate Court reviews the decision of the referee is that which is contained in the bill of exceptions, or which has been supplemented at another hearing by a referee upon a re-referral of the case to him. Under the provisions of Rule 30 of the Rules of the Probate Court, the Referee is the trial judge and the Probate Judge acts as the appellate court.

May a party at the trial acquiesce in the introduction of certain evidence, and, upon an appeal from an adverse decision, challenge for the first time the admissibility of such evidence? Clearly, such a practice would violate

due process, because the opposing litigant would be denied the opportunity of supplanting, if necessary, the inadmissible evidence with proper proof during the trial. The state courts, however, permitted such practice in this case.

Quite certainly, if the complaining parties had raised these objections at the trial, and the referee had sustained them, the petitioners would have produced other evidence, or, at least, would have had the right and opportunity to attempt the same. In denying the petitioners this right, they have been denied procedural due process of law.

To reiterate, the sole issue was whether the petitioners, Etel Ober and Ioan Nagyivan, niece and brother, respectively of our decedent, survived the decedent, and are presently living. *We must accentuate that all of the documentary evidence which is in the record was either admitted without objection or was introduced as respondents' own evidence.* Obviously, no authority need be cited for the proposition that such evidence, once admitted, must be considered by the court. Certainly, the respondents are estopped on the appeal from an adverse decision, to challenge the evidence after the bill of exceptions has been duly settled. Since the record is devoid of any evidence on the part of the respondents to rebut or contravene the evidence in support of the petitioners' claims, the decision of the referee should have been sustained.

In allowing the decision of the Probate Judge to stand, the Supreme Court of Ohio had condoned a practice which, we believe, violates the requirement of fundamental fairness assured by the Due Process Clause and the denial of property provision of the Fourteenth Amendment.

2. The Decision Violates the Consular Convention of 1881 Between the United States and Romania, and Infringes Upon the Conduct of Foreign Relations by the Federal Government.

There is presently in force and effect, a treaty between our government and that of Romania known as a Consular Convention, Treaty Series, No. 297, which, in its portion pertinent hereto, provides, as follows:

> "* * * official documents of every kind, whether in the original, in copies, or in translation, duly authenticated and legalized by the consuls-general, consuls, vice-consuls, and consular agents, and sealed with their official seal, *shall be received as legal documents in courts of justice throughout the United States and Roumania.*" (Italics added.)

An examination of the various exhibits in the record will disclose that they are official documents from Romania, and that they have been "duly authenticated and legalized" by the respective consular officers of the countries, and, therefore, admissible "as legal documents in courts of justice throughout the United States and Roumania." Article VI, cl. 2 of the Constitution of the United States declares that "treaties" are part of "the supreme law of the land; and the Judges in every state shall be bound thereby."

Due to the international ramifications of an incorrect decision in this case, the proper resolution of the questions presented are of the utmost importance. The intercourse of this country with foreign nations, and its policy in regard to them, are placed by the Constitution of the United States in the hands of the federal government, and its decisions upon these subjects are supreme. The descent and distribution of property in one state to the citizens of another state is clearly a proper subject of international

relations. See *Geofrey v. Riggs*, 133 U. S. 258. The federal constitution by Art. I, Section 10, imposes severe limitations on the several States' power to affect the foreign relations of the United States: "Complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states." *United States v. Belmont*, 301 U. S. 324, 331.

The decision of the Probate Judge is based, essentially, on the inadmissibility of the evidence contained in the official documents which came from Romania. The treaty between the United States and Romania by its applicable provision, makes such documents "legal documents" to "be received in courts of justice throughout the United States and Roumania." The conduct of relations between the respective governments may be impaired by a decision of a state court ignoring and refusing to give legal cognizance to the legal procedures and official actions of a government with which this country maintains full diplomatic relations. It takes only common sense to envisage the problems which may arise in the conduct of foreign relations if a state tribunal may refuse to give faith and credit to the official actions of a foreign government, which the United States recognizes, and with which it maintains full diplomatic relations.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN R. VINTILLA,
Counsel for Petitioners.

APPENDIX I.

OPINION OF THE PROBATE JUDGE.

This matter is before the Court on exceptions to a finding by the referee which determined that there are heirs, residents of Romania. Two heirs are residents of Cleveland, Ohio, and were represented by counsel.

The judgment in this case must revolve around the question of whether heirship can be established by hearsay and statements in the form of affidavit made by parties on information and belief. Opposed to the contention that there are heirs in Romania, is the positive testimony by the two heirs here in Cleveland that they have no relatives in Romania and that there are no other heirs of the decedent besides themselves.

This comes to a discussion of the value of affidavits and statements made based on hearsay. The function of affidavits in the realm of litigation is well known, but it can never be a substitute where evidence of another class is required. By virtue of Revised Code section 2123.05, the Probate Court may hear proof taken by commission or by witness produced in open court of the facts set forth in the petition. The transcript of testimony taken before the referee shows no proof of the nature required by statute which would establish heirship of persons in Romania. There was a sort of series of interrogatories by counsel who went to Romania to interview persons who might establish the heirship. These interrogatories were not in the category of those attached to pleadings and in the opinion of the writer were merely memoranda to assist the interrogator in acquiring the hearsay evidence.

While hearsay evidence is very often admitted to prove heirship, or other relationship, a qualification of that rule is that before the declarations can be admitted

the relationship of the declarant with the family must be established by some proof independent of the declaration itself, though but slight proof thereof will be required since that relationship may be as difficult to prove as the fact in controversy. Nor does the rule admitting reputation as to family history extend to allow hearsay as to specific facts of sickness or peculiarities of individual members of the family. *State v. Leuth*, 5 O. C. C. 94.

By statute, the admission of affidavits is authorized and proper, where a provisional remedy * * * is sought, but the admission of affidavits over objection is unauthorized and improper in the trial of an action on its merits * * * *Bank v. Cleaning Co.*, 174 O. S. 510.

For the reasons stated herein, the finding of the referee is modified to find that James Nagy and Joseph Nagy, nephews of the decedent, are the only heirs, and are so designated, share and share alike. As so modified, the finding of the referee is reduced to judgment.

APPENDIX II.

JOURNAL ENTRY OF COURT OF APPEALS.

This cause came on to be heard on appeal on questions of law from the judgment of the Probate Court of Cuyahoga County, and was argued by counsel for the parties; and upon consideration thereof, the Court finds there is no error prejudicial to the appellants, and, therefore, the judgment of the Probate Court is affirmed, and it is ordered that appellees recover of appellants their costs herein taxed.

The Court further finds there was reasonable grounds for this appeal.

It Is Ordered that a special mandate issue out of this Court directing the Probate Court of Cuyahoga County to carry this judgment into execution.

APPENDIX III.

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR CUYAHOGA COUNTY TO CERTIFY ITS RECORD.

(January 11, 1967.)

It is ordered by the Court that this motion is overruled.

ORDER OF THE SUPREME COURT OF OHIO DISMISSING APPEAL AS OF RIGHT, FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY.

(January 11, 1967.)

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein,

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING.

(February 8, 1967.)

It is ordered by the court that rehearing in this case is denied.

APPENDIX IV.

RULES OF PRACTICE OF THE SUPREME COURT OF OHIO.

* * * * *

RULE I.

NOTICE OF APPEAL.

Section 1. From Court of Appeals.

(A) The notice of appeal from a Court of Appeals must be filed in the court from which the case is appealed within twenty days in a civil case (Section 2505.07, Revised Code) and within thirty days in a criminal case (Section 2953.05, Revised Code) from the entry of the judgment or final order appealed from and shall set forth:

(a) The order or judgment appealed from, and

(b) Whether the case originated in the Court of Appeals, and

(c) Whether the case involved a substantial constitutional question.

* * * * *

Section 3. Consideration as to Existence of Constitutional Question.

If an appellant claims a constitutional question and also proposes to prosecute an appeal on issues of law of public or great general interest, he must file both at the same time.

Where appellant claims that he has an appeal as of right (*i.e.,* that the case involves a constitutional question), the Supreme Court will *sua sponte* consider the case as on a motion to dismiss said appeal as one not involving any substantial constitutional question and will consider such motion to dismiss at the same time that it considers any motion to certify or motion for leave to appeal in the case.

* * * * *

APPENDIX V.

RULE 30 OF THE RULES OF THE PROBATE COURT OF CUYAHOGA COUNTY.

30. PROCEEDINGS BEFORE REFEREES.

(a) In adversary proceedings decided by a referee, such referee shall prepare, in writing, separate findings of fact and conclusions of law, which shall be currently dated and a copy mailed to each counsel of record in the proceedings.

(b) Within ten (10) days after the decision and findings of the referee, a written motion for re-hearing may be filed which will be assigned to such referee for consideration and ruling. Such motion should contain a concise statement of the grounds and reasons for such request and may be supported by affidavits or brief or both. Adverse parties may likewise file briefs in accordance with a schedule fixed by the referee. If an oral hearing before the referee is requested, it should be so stated in the motion. The decision of the referee on such motion shall be reduced to writing and filed in the case and counsel for all parties notified in writing accordingly.

(c) Within twenty (20) days after the decision by the referee, or his decision on the motion for re-hearing, any party may except to such decision of the referee by filing with the Court such exceptions, reduced to writing, and containing a statement that a copy of such exceptions has been mailed or delivered to each counsel of record in the case.

(d) Within forty (40) days after the filing of exceptions with the Court, the party filing same must cause to be filed in the case, a bill of exceptions, together with all exhibits, including the referee's findings and conclusions.

The bill of exceptions must be in the same form and content as though it were being presented to a trial judge and must contain a statement that all parties in the case have been notified of its filing.

(e) Any counsel in the case may file objections or exceptions to such bill of exceptions within ten (10) days after the filing of such bill.

(f) The referee shall hear such objections or exceptions and correct such bill of exceptions, if necessary, to conform to the exact proceedings as had at the trial before such referee. The referee shall then date and sign the bill of exceptions and direct it to the attention of the Probate Judge. Simultaneously with the transfer of the bill of exceptions to the Judge, the referee shall cause to be delivered to the Judge the entire file, including the finding of facts and conclusions of law. The referee shall, in writing, immediately advise all counsel of the date of delivery to the Judge of the signed bill of exceptions.

(g) Within twenty (20) days after the bill of exception is delivered to the Probate Judge, a review by the Court may be requested in writing by any party in the case. Such request shall be accompanied by a written assignment of errors complained of and a brief in support thereof and a statement that a copy has been served by mail on all adversary and associate counsel.

APPENDIX VI.

DECISION OF REFEREE.

A Petition to Determine Heirship was filed in this Court on January 31, 1964. All interested parties were properly served according to law and service by publication was made upon the unknown heirs and next of kin of Theresa Kovacs. The answer of Ioan Nagyivan and Etel Ober, nee Nagyivan, was filed February 5, 1964. Hearings were held before this Referee on April 20, 1964, and October 14, 1964, and testimony of the witnesses has been reduced to writing and filed herein. The deposition of Anna Pascau was considered.

Considered in this opinion are the statements submitted as a brief by John R. Vintilla, dated May 6, 1964, and the reply thereto by Ellis V. Rippner, dated May 29, 1964, and the letter of June 2, 1964, of John R. Vintilla.

By stipulation of the attorneys there was submitted to John R. Vintilla, who was planning a trip to Romania sometime during the summer of 1964, certain questions which were submitted by James Nagy to be answered by Ethel Ober in Romania, such questions to be asked by Mr. Vintilla and answered in his presence.

The hearing of October 14, 1964, was concerned with the questions and answers, and Mr. Vintilla testified at the time of the hearing that he met with Etel Ober and Ioan Nagyivan. Many of the questions propounded to Etel Ober were not answered, and many, according to the testimony of her two brothers, were not answered correctly. However, a substantial number of these questions were answered according to the testimony of James Nagy, who came to the United States in 1922, when he was approximately ten years old. Many of the things he was inquired of he did not remember, such as the name of

the church where he was confirmed; he also did not remember whether his brother, Joe, lived with him in Romania or not.

Evidence was submitted, at the time of the hearing that certain pictures which were in the possession of Etel Ober were given to Mr. Vintilla. These pictures were of Joseph and James Nagy and were admitted to have been taken in this country.

The sole question before this Court is whether there is evidence to find that the decedent, Theresa Kovacs, died leaving a brother and a niece surviving, and living in Romania, who are the heirs of the said Theresa Kovacs. There is no question that there are two nephews of the decedent, James Nagy and Joseph Nagy, living in Cleveland, Ohio. There is also no question that the decedent had a niece and a brother living in Romania at one time.

The Power of Attorney from Nagyivan Ioan and Ober Etel, nee Nagyivan, to John Vintilla, 420 Hanna Building, Cleveland 15, Ohio, has been properly translated and authenticated by the proper authorities and filed herewith.

On August 22, 1963, Wilhelm Frigyes, a pensioner, residing at Timisoara III, 40 Mihai Viteazul Blvd., and Szanto Paulina-Stefania, a housewife by occupation, residing at Timisoara III, 19 Ion Vasi St., declared on their own responsibility that they were acquainted with the fact that the decedent, Kovacs Terezia, nee Nagyivan, who died in the United States, had two brothers, as follows:

1. Nagyivan Ioan, who is alive, and resides at Timisoara III, 16 Mihai Viteazul Blvd.

2. Nagyivan, Iosif, who died in the United States and had the following three children:

Ober Etel, nee Nagyivan, who is alive and resides at Timisoara III, 23 Ion Vasi St.

Nagyivan Imre, who resides in Cleveland, Ohio, U. S. A.

Nagyivan, Iosif, who resides in Cleveland, Ohio, U. S. A.

This declaration bears the authentication No. 7792.

Also submitted into evidence is a Birth Certificate from the Romanian People's Republic, Central Service of Vital Statistics of (surname) Nagyivan Ianos, Sex, Male, born on the 19th day of June, 1892, the son of Nagyivan, Antal and Nagyivan, Barbara. This document has been properly authenticated and translated into english.

There was also submitted into evidence a Marriage Certificate, the husband's surname being Ober, his given name Carol, born on March 26, 1900. The wife's surname being Nagyivan Etel, born on November 16, 1902, daughter of Nagyivan Iosif. The marriage was registered at Timisoara, County of Timisoara, in the Registrar's register at No. 409, issued on July 31, 1921. This document has been properly authenticated and translated.

Also submitted into evidence was the Birth Certificate of Etel Nagyivan, born on the 16th day of November, 1902, the daughter of Nagyivan Joszef, and Nagyivan Etel. These documents have been authenticated by the Vice Consul of the United States of America, at Bucharest, Romania.

A further declaration was submitted into evidence from Szanto Paulina Stefania, housewife by profession, residing at Timisoara III, 19 Ion Vasi St. and Riedl Ana, labourer by profession, residing at Timisoara, III, 19 Ion Vasi Str., on their own responsibility, declaring that the decedent, Nagyivan Etel, nee Toth, who died in the United States of America, had the following three children:

Ober Etel, nee Nagyivan, who is alive at present, residing at Timisoara III, 23 Ion Vasi St., Nagyivan Imre, domiciled in Cleveland, Ohio, U. S. A., and Nagyivan Iosif, domiciled in Cleveland, Ohio, U. S. A.

The deposition of Anna Pascau, taken on April 23, 1964, has been considered, and, although her testimony indicated that the decedent had a brother and a niece whom she assumed to be in Romania, she did not know if they were still alive. Her testimony further stated, on Page 8, that Joe stated that in all probability the letter from Etel Ober to her brother, Joseph Nagy, Defendant's Exhibit 1-A, was not written by her (Etel Ober) because it appeared to be written by an intellectual person. There was some evidence at the hearing that Joseph Nagy had heard from the Red Cross that Etel Ober was dead, however, no other evidence except statements of James Nagy and his brother. There was no evidence other than statements of Mr. Nagy to the effect that a Red Cross Representative had called or sent a telegram stating that Etel Ober had died in Romania. There was no official confirmation nor any records submitted to show Etel Ober's death. In accordance with general principle that once a relationship or status is proven to exist it will be presumed to continue to exist as before until the contrary is shown (21 *O. Jur.* (2d) § 122 p. 135).

In a determination of heirship it is important that the Court be fully satisfied and convinced that the heirs claiming a portion of the decedent's estate be the true heirs of the decedent.

Upon the evidence submitted it is the finding of fact that the decedent had two brothers, Nagyivan Ioan, who is alive and resides at Timisoara III, 16 Mihai Viteazul Blvd., and Nagyivan Iosif, who died in the United States leaving three children, Etel Ober, who was alive in

August of 1963, Nagyivan Imre, Cleveland, Ohio and Nagyivan, Iosif, Cleveland, Ohio.

The declarations submitted are properly authenticated and must be admitted into evidence as the best evidence obtainable.

It is the further finding of fact that the three affiants, Szanto Paulina Stefania, Riedl Ana and Wilhelm Frgyes, living in the same location (Timisoara III) have knowledge of Ober Etel and her address and her family relationship. Two of the three witnesses have known of Nagyivan Ioan and his background and residence. There is no evidence submitted to contradict these statements which were sworn to, under oath and authenticated,

It is, therefore, the conclusion of law that the administration of the estate of Theresa Kovacs, deceased, include the following heirs:

Ioan Nagyivan, a brother, and three children, of a deceased brother, namely, James C. Nagy, Joseph Nagy and Etel Ober.

APPENDIX VII.

OHIO REVISED CODE, SECTION 2321.05

§ 2321.05 Filing bill of exceptions.

When an appeal is taken from a final order, judgment, or decree as defined by section 2505.02 of the Revised Code, and the appellant's assignments of error cannot be demonstrated on the face of the record as disclosed by the transcript of the docket or journal entries and the original papers filed in the appellate court as required by section 2505.08 of the Revised Code, the appellant must prepare and file, within forty days of perfecting his appeal by filing a notice of appeal as provided by section 2505.04, of the Revised Code, a bill of exceptions setting forth that part of the evidence and such other matters occurring during the progress of the trial or proceedings under the rules of trial procedure, not contained in the transcript upon which the appellant asserts his claims of error. When an appellant files a bill of exceptions as provided in this section claimed by him in the exercise of good faith as sufficient to demonstrate the assigned claims of error, and, upon trial of the appeal, it appears to the appellate court, that other parts of the evidence or trial procedures are necessary, in the interests of justice, to give fair consideration to the errors claimed, and the counterclaims, answers, or contentions of the appellee thereto, the appellate court may require the appellant to have certified by the trial court and filed as directed by the appellate court such additional parts of the evidence and matters occurring during the progress of the trial or proceedings as are deemed necessary by the appellate court.

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